INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
Statute of the State the validity of which is involved	2
Date of the judgment and application for appeal	4
Nature of the case and rulings below	5
Appendix "A"—Opinion of the Supreme Court of New Jersey	28
Appendix "B"—Opinion of the Court of Errors and Appeals of New Jersey	30

Table of Cases Cited

Dugan v. *Ohio*, 277 U. S. 61	25
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134	23
Hamilton v. *University of California*, 293 U. S. 245, 633	4
Horsman Dolls, Inc. v. *State of New Jersey Unemployment Compensation Commission*, 133 N. J. L. 11, 42 Atl. (2d) 777, 134 N. J. L. 77, 45 Atl. (2d) 681	27, 29
Live Oak Water Users Association v. *Railroad Commission*, 269 U. S. 354	4
Morgan v. *U. S.*, 298 U. S. 468, 304 U. S. 1	23
Opp Cotton Mills, Inc. v. *Administrator*, 312 U. S. 126	23
Provident Mutual Co. v. *Unemployment Compensation Commission*, 126 N. J. L. 348	25
Shields v. *Utah, Idaho Central R. R. Co.*, 305 U. S. 177	23
St. Joseph Stockyards v. *United States*, 298 U. S. 38	22

Page

Sultan Railroad & Timber Co. v. *Department of Labor and Industries*, 277 U. S. 135 4
Tumey v. *Ohio*, 273 U. S. 510 25
Williams, Ex parte, 277 U. S. 267 4

STATUTES CITED

Constitution of the United States, 14th Amendment
Laws of New Jersey of 1936, Chapter 270, approved December 22, 1936, as amended by Chapter 247 of the Laws of 1940, approved December 23, 1940 2
Revised Statutes of New Jersey:
37:21-10 23
43:21-10 28
United States Code, Title 28, Section 344 (a) as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 937, and Title 28 U. S. Code, sections 861(a) and 861(b), Act of January 31, 1928, c. 14, Section 1, 45 Stat. 54; Act of April 26, 1928, c. 440, 45 Stat. 466 ..... 1, 2

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 839

HORSMAN DOLLS, INC.,
Prosecutor-Appellant,

vs.

STATE OF NEW JERSEY UNEMPLOYMENT COMPENSATION COMMISSION,
Defendant-Respondent

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF BASIS OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Appellant contends that the basis upon which the Supreme Court of the United States has jurisdiction to review on appeal the judgment of the Court of Errors and Appeals of the State of New Jersey in this cause is:

1. The statutory provisions sustaining the jurisdiction are found in Title 28, U. S. Code, Section 344 (a), pp. 205, 206 (Act of February 13, 1925, c. 229, Section 1, 43 Stat. 937):

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could

be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

and in Title 28 U. S. Code, Sections 861 (a) and 861 (b) (Act of January 31, 1928, c. 14, Section 1, 45 Stat. 54; Act of April 26, 1928, c. 440, 45 Stat. 466):

"861 (a). Writ of error abolished substitution of appeal. The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

"861 (b). Statutes governing writs of error to apply to appeals. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which section 861A of this title substitutes for a writ of error."

2. The statute of the State of New Jersey, the validity of which is involved, is Chapter 270 of the laws of 1936 of the State of New Jersey, approved December 22, 1936, as amended by Chapter 247 of the laws of 1940 of the State of New Jersey, approved December 23, 1940, which statute is commonly known as the State of New Jersey Unemploy-

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ment Compensation Act; and more particularly that certain administrative Order purporting to be made under the said statute by the New Jersey Unemployment Compensation Commission, which is the highest administrative body under the Act, which Order is now in these proceedings as the Order of Removal of July 14, 1944, made by the State of New Jersey Unemployment Compensation Commission. For the purposes of review by the Supreme Court, under the statute, a State statute includes not only enactments of the Legislature but also administrative orders purporting to be made under State statutes. It will be helpful to insert here Section 10-B of the State of New Jersey Unemployment Act to which frequent reference is made hereinafter.

"(b) Executive director—The commission shall appoint an executive director who shall be the chief executive and approval officer of the commission and its official agent for all purposes and who shall hold office at its pleasure. He shall give his full time to the duties of this office, shall be paid a suitable salary to be fixed by the commission and shall have general charge and supervision of the work of all departments of the commission as well as any subdivisions thereof.

It shall be the duty of the executive director to administer this chapter with the advice of the commission; and to that end, the executive director shall have the following duties and powers;

(1) To formulate necessary rules and regulations, subject to approval by the commission.

(2) To appoint and fix the compensation of members of the staff, subject to approval by the commission; such appointments shall be made subject to the provisions of title II, Civil Service, at such compensation as may be fixed by the New Jersey Civil Service Commission.

(3) To make such expenditures as are necessary in the discharge of his functions hereunder as provided

for in the budget to be approved annually by the commission, to make requisitions for any funds provided by the Federal government for administration of this chapter, and he is hereby authorized to draw vouchers on the administration fund for the purpose of administering this chapter.

(4) To draw vouchers upon the unemployment compensation fund and the appropriate accounts therein for the payment of benefits.

(5) To delegate to other persons any of the powers conferred upon him by this chapter, so far as is reasonably necessary."

Live Oak Water Users Association v. *Railroad Commission,* 269 U. S. 354; *Sultan Railroad & Timber Co.* v. *Department of Labor and Industries,* 277 U. S. 135; *Compare Ex Parte Williams,* 277 U. S. 267; *Hamilton* v. *University of California,* 293 U. S. 245; rehearing denied in 293 U. S. 633.

3. The decision of the Court of Errors and Appeals of the State of New Jersey was rendered on January 31, 1946. On May 13, 1946, the judgment on said decision, which is here sought to be reviewed, was entered as of January 31, 1946. The date upon which the application for this appeal was presented was August 8, 1946.

(References hereinafter made to the record refer to the record as filed with the Court of Errors and Appeals of New Jersey.)

4. The prosecutor, Horsman Dolls, Inc., is an employer unit registered with the Unemployment Compensation Commission of New Jersey. On the basis of the payrolls of Horsman Dolls, Inc., the Unemployment Compensation Commission established a contribution rate or tax rate for that company for the calendar year 1942. The company

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promptly protested the rate and on March 9, 1943, it filed a Petition for Hearing on printed forms supplied to it by the Commission for that purpose (S. C., p. 38). No objection was made by the company to the form of hearing provided by the Commission. If successful in its protest, Horsman Dolls, Inc., was entitled to receive a refund from the Commission as well as a new contribution or tax rate.

5. The Commission referred the company's petition to its Referee who had been appointed by the Executive Director of the Commission, pursuant to Section 10b of the Unemployment Compensation Law R. S. 43:21-10. The Referee gave notice of a hearing before him for April 15, 1943 (S. C., p. 39). The notice of hearing was accompanied by instructions as to the method of procedure used at these hearings (S. C., p. 41).

The issues, briefly were as follows:

(a) Was the tax rate established by the Commission for Horsman Dolls, Inc., an illegal tax rate?

(b) Were the deductions made by the Commission from the company's account illegal deductions?

(c) Did the Commission violate the mandate of the statute in establishing the tax rate?

(d) Did the Commission violate the requirements of Due Process in establishing the tax rate?

6. These issues raised by the company in its petition were duly tried before the Referee. The Commission, as the respondent to the petition, appeared by its counsel, cross-examined the witnesses of the company, and at the conclusion of the company's case the Commission presented its defense and examined its own witnesses (S. C. pp. 29, 30). The Commission, in all respects, defended on the merits the

contribution rate which it had fixed for Horsman Dolls, Inc. (Testimony of Referee S. C. pp. 105-118). The hearings were finally concluded before the Referee and both sides agreed to submit briefs to the Referee (S. C. p. 30). Counsel for the company submitted his brief. Counsel for the Commission, after some delay, advised that it would submit no brief and would request the Referee "that a decision be made upon the record as it appears before him" (Letter of Charles A. Malloy, Chief Counsel, to Samuel Kaufman, S. C. p. 45).

7. On January 21, 1944, the Referee wrote to counsel for the company that, "My decision in the above matter will be in your hands within the next few days" (S. C. p. 48).

No decision was filed by the Referee, however, and on July 14, 1944, the Commission made an order removing the case from the Referee to itself "for further hearing and determination" (S. C. pp. 19, 51), (Letter of Commission) p. 277 (minutes of Commission).

Upon the filing of an affidavit reciting the foregoing facts, the Writ of Certiorari issued, with leave to take Depositions. Upon the basis of the Depositions so taken, and the arguments of counsel, the New Jersey Supreme Court set aside the Commission's order of removal (S. C., pp. 299-301).

8. The validity of the Order of Removal of July 14, 1944, was challenged at the outset in the New Jersey Supreme Court by the Appellant, on the ground that it was repugnant to the 14th Amendment to the United States Constitution in that it deprived Appellant of its property without notice and an opportunity to be heard before a fair and impartial tribunal, and thus without due process of law. This contention appears repeatedly in the reasons for reversal filed at the outset of the Certiorari proceedings in the New Jersey Supreme Court (S. C. pp. 20, 26). The Commission promptly took an appeal from the

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New Jersey Supreme Court to the New Jersey Court of Errors and Appeals and then the decision of the New Jersey Supreme Court was reversed in spite of the argument by counsel for the Appellant that the Order of July 14, 1944, was directly repugnant to the 14th amendment of the United States Constitution in that it deprives the Company of its property without due process of law.

9. The depositions taken in this matter are startling in their disclosures. They reveal a shocking chain of events and bring to light an unparalleled abuse of the administrative process.

Appellant called as a witness, William C. Nowels, the Referee to whom the Commission had referred the matter of Horsman Dolls, Inc., for hearing and determination. His testimony was uncontradicted except for minor irrelevant details.

10. The Referee, a member of the Bar of New Jersey (S. C. p. 62), was appointed to his position in March, 1941 pursuant to Section 10b of the Unemployment Compensation Law, R. S. 43: 21-10 (S. C., p. 7—3rd full paragraph, S. C., p. 117). The Acting Executive Director and the Commission were unanimous in their praise of the Referee as an able, efficient and conscientious tribunal (S. C. pp. 151, 207) for the three and a half years he so officiated (S. C., pp. 249-250). During that time he did no other work for the Commission except as Referee hearing cases referred to him by the Commission (S. C. pp. 89-90). Upon his appointment, the Referee was instructed to decide the cases before him as he saw them, in accordance with his judgment of the law and the facts (S. C. p. 64). After his appointment, he heard and decided approximately seven hundred cases (S. C., p. 64). As with other tribunals, his decisions were accepted, appealed, affirmed, reversed or modified in the normal course (S. C., p. 207).

11. The *Horsman Dolls* case did not, however, take that normal course. The hearings before the Referee were concluded on November 1, 1943 (S. C. p. 65). Counsel for petitioner was given seven days to file his brief and counsel for the Commission received seven days to answer (S. C. p. 30). There was a delay by the Commission's official stenographer in transcribing the record, and petitioner's brief was not filed until November 18 (S. C., p. 31) which was within time and within seven days after receipt of the transcribed testimony (S. C., p. 71).

12. In the meantime, a very strange thing occurred. About a week or ten days after the hearings were concluded and before Petitioner's brief was filed (i. e., about November 8-10, 1943) (S. C., pp. 70-71), a conference was held in the Trenton office of Frank T. Judge, Acting Executive Director of the Commission. Present, were Mr. Judge, the Referee, the Chief Counsel to the Commission and his legal assistant (S. C., p. 70). Counsel for the Petitioner was not present and the meeting was held without his knowledge (S. C. p. 73). Mr. Judge summoned the Referee to the conference (Testimony of the Referee, S. C., p. 71, Testimony of Mr. Judge, S. C., p. 144).

The Referee was first asked to decide the case in the absence of Petitioner's brief (S. C., p. 71). He was asked to "dismiss the proceedings, or deny the petition, or whatever it might have been, because of the failure to file a brief in time" (S. C., p. 73). The Referee rejected this request and pointed out that Petitioner's brief was not out of time because the transcript of testimony had not been made available as yet by the Commission to counsel (S. C., p. 71). The Referee testified:

> "I then advanced the thought or statement that the brief was not out of time and since the transcript was

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not available that could not be decided right away" (S. C., p. 73, cf. Testimony of Mr. Judge, pp. 144-146).

13. The conference continued, however, and the issues and merits of the *Horsman Dolls, Inc.*, case were thoroughly discussed (S. C., p. 73). Mr. Judge and both counsel for the Commission argued the merits against the Horsman Dolls Company and sought to persuade the Referee to find against the company and in favor of the Commission (S. C., p. 73). The Referee replied that on the merits of the case as he remembered the testimony he intended to decide in favor of the company and refused to capitulate to the persuasion (S. C. p. 73).

Finally, as the Referee testified:

> "this conference in November was left—we left the matter with the understanding that I was to review the briefs submitted by counsel and then either advise Mr. Malloy or Mr. Judge of my decision after I had an opportunity to review the testimony and the briefs and whatever law I might want to look up myself" (S. C., p. 74).

It need not be emphasized that the officials of the Commission had no right to exact this pledge from the Referee.

14. Shortly after this conference and on November 18, 1943, within time, the company filed its brief with the Referee and sent a copy to the Chief Counsel for the Commission (S. C., p. 31). The rest of November and December went by without a brief from the Commission, although petitioner's counsel wrote three times asking for it (S. C. pp. 31, 42, 43, 44), and counsel for the Commission promised to send it (S. C., p. 43). Finally on January 3, 1944, counsel for the Commission wrote petitioner's counsel that the Commission would file no brief and that the Referee would be so advised, and would be requested to

make a decision "upon the record as it appears before him" (S. C. p. 45).

15. Startling as it may appear, however, the depositions revealed that the Commission did in fact present a brief to the Referee. Sometime after the company's brief was filed (S. C., p. 66), counsel for the Commission gave the Referee a short brief with the request that he should "peruse it and return it." The Referee read it and returned it (S. C., pp. 65, 66). During the taking of the Depositions, counsel for the Commission recalled that its brief was given to the Referee "either in the latter part of November or the beginning of December." (See form of questions on cross-examination of Referee, S. C., p. 96, question No. 2.)

On further cross-examination the Referee testified as follows:

> "Q. Isn't it a fact that it was not read by you or considered by you as a memorandum of Law? A. I considered it as a brief on an argument submitted by Chief Counsel's office in their behalf in the Horsman Dolls case.
>
> Q. Although according to your recollection it only gave a summary of the facts as they appeared in the testimony? A. Well, as I said before, I don't remember the contents very clearly; but I still considered it as a brief; and, in fact, the very words used by yourself when you submitted it to me were, 'Here is my brief and I want you to return it to me as soon as you have considered it' " (S. C., p. 97).

Neither counsel for the Commission, nor his assistant, although present, took the stand to deny this testimony.

16. No copy of this brief submitted by the Commission's counsel was ever furnished to counsel for the company. In spite of these facts contained in the record, the brief on appeal now filed by counsel for the Commission contains

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the assertion that: "The attorneys for the Commission, in accordance with the well settled practice (S. C., p. 233, ll. 20-31) did not submit a brief" (brief of appellant, bottom p. 3). Such a statement, at this time, in the light of the uncontradicated testimony, is incomprehensible.

Having been advised that the Commission would submit no brief, counsel for the company wrote to the Referee twice during January, 1944, asking for the decision (S. C. pp. 31, 46, 47, 68, 69). Finally, on January 21, the Referee wrote to counsel for the company that, "My decision in the above matter will be in your hands within the next few days" (S. C. pp. 48, 69).

The Referee's prediction did not come true. He actually made a decision "within the next few days" in favor of the company. He prepared a rough draft of his opinion and eventually put the rough draft in final form (S. C. p. 69). But from January, 1944, until after the decision of the court below, he was prevented by the Commission and its representatives from filing that decision.

17. At the end of January or early in February, a second conference was arranged by Mr. Judge, the Acting Executive Director, which lasted for over an hour (S. C. p. 78) in his office (Testimony of Referee, pp. 74-78, Testimony of Mr. Judge, pp. 149-153). Present were Mr. Judge, the Referee, the Chief Counsel of the Commission and his assistant (S. C. pp. 74, 149). Neither counsel nor anyone else on behalf of the Horsman Dolls Company was present, nor did they know of the conference (S. C. pp. 77, 120).

The Referee informed all present that he had reached a conclusion adverse to the Commission and "that I was going to write my decision or that I had written it" (S. C. p. 74, cf. Testimony of Mr. Judge, pp. 149, 150). The merits of the case were then thoroughly discussed (S. C. pp. 75, 158), and as the Referee says, "they (Mr.

Judge and Mr. Ringle) could not seem to understand why I could not find in favor of the agency" (S. C. p. 75).

18. In addition to legal arguments, "other" forms of persuasion were tried out on the Referee at this conference. He was reminded that he was an employee of the Commission (S. C., p. 75). As a matter of fact, the Referee was dependent on this job for his livelihood (S. C. p. 88). He testified as follows:

> "Q. Was any suggestion made that you were an employee of the Commission and you should be loyal to the agency? A. Well, there was a lot of talk along those lines" (S. C. p. 75).
>
> • • • • • • •
>
> A. Mr. Judge, if I recall correctly, made a statement that he could not understand why I as an employee of the Commission could not find in favor of the Commission after I had heard the argument presented by Mr. Ringle. He felt there was sufficient ground for me to find in favor of the Commission.
>
> Q. What did you tell him? A. I told him as long as I had to sign the decision and it was my decision I would make the decision. I could not find sufficient grounds, as far as I was concerned; it was my best judgment that the employer, the Horsman Dolls, was correct, and I was going to make that decision" (S. C. p. 77).
>
> • • • • • • •
>
> "Q. What did you understand by Mr. Judge's remarks that the Commission would not understand why you, an employee of the Commission, could not find in their favor? A. Just what I said.
>
> Q. Were you drawing any inference from that remark? A. That they wouldn't like it.
>
> Q. Did you feel that might react against you? A. I didn't know" (S. C. p. 122).

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Bearing out this testimony of the Referee, Mr. Judge testified as follows:

> "Bill, I am not a lawyer, but as I listen to this discussion here I would not have an awful lot of difficulty in handing in a decision that would reflect the views that were expressed here by Mr. Ringle and Mr. Malloy. However, you are the Referee; this is your job. I would never do anything myself that would stultify my conscience, and I certainly would not want you to do anything that would stultify yours" (S. C. p. 150).

The Referee refused to be "convinced" by all of this persuasion (S. C. p. 77). The conference ended when he was finally told that the case would be removed from his hands and taken over by the Commission itself (S. C. p. 78).

19. Shortly after this conference, however, Mr. Judge changed his mind. He called the Referee in and told him that he "could go ahead and decide the case" (S. C. p. 78). This permission was coupled, however, with suggestions such as,

> "He asked me to try to look at it in a favorable light in so far as the Commission was concerned" (S. C. pp. 78, 79).
>
> "Well, he advanced the thought that I would try to decide it in favor of the Commission if I could" (S. C. p. 79).

Mr. Judge did not recall the last conversation with the Referee (S. C. p. 153), but seemed to remember it all as a part of the main conference in January. In fact Mr. Judge tells us that the January conference was quite successful for the Commission.

Thus he testified:

> Q. Now, how did the conference end? A. Well, Mr. Nowells got up and said, "Well, I feel much better now.

I think I can write a decision embracing these views expressed here today".

Q. You mean that he said that he was going to write a decision adopting the viewpoint of Mr. Malloy and Mr. Ringle? A. That was my understanding. I further recall that as he left the room he said, "I will get together with Herman upstairs on this. ("Herman" is identified as Herman Ringle, legal assistant to Mr. Malloy, Chief Counsel of the Commission.)

Q. Was that for the purpose of having Mr. Ringle—Herman—help him in formulating the decision? A. I don't know what the purpose was.

Q. Then he left the conference, and you understood that Messrs. Malloy and Ringle had succeeded in convincing him to decide the case their way, is that right? A. I got the impression when he left the conference, from his remark, that he felt he could write a decision embracing the views expressed by Mr. Malloy and Mr. Ringle" (S. C. pp. 152-153).

No wonder that Mr. Judge told the Referee "that he could go ahead and decide the case!" If Mr. Judge's testimony is true, it would appear that he and his associates had succeeded in their attempt to corrupt the Referee. The Referee, however, testified otherwise. He struggled with the matter. He reviewed the testimony and the company's brief again; he did some independent legal research, but could not bring himself to do what had been asked of him. He described it as follows:

"I put the case away for about a month, as I recall it, so as to approach it cold, and I took the testimony and I read it, and I read the brief, did some research of law myself and I came to the same conclusion. I also tried to write a decision in favor of the Commission if I could, but I couldn't. I drew one, but it didn't sound right to me and I destroyed it" (S. C. p. 79).

20. During the cross-examination of the Referee by counsel for the Commission, a most remarkable document came

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to light. The Referee testified that counsel for the Commission wrote and submitted to him a form of decision which could be used in the *Horsman Dolls* case (S. C. pp. 113, 114). The testimony is as follows:

> "The Witness: That isn't the only thing you submitted to me, either. You submitted a form of decision for me to write, too.
>
> Q. May I see it? A. Yes. (Producing paper.)
>
> Q. Now, you have just stated that I submitted to you a form of decision which could be written, is that right? A. That is right.
>
> Q. When did that take place? A. Frankly, I don't know. I don't know the exact date, but I would say it took place some time after January—I am not sure—the dates are not clear in my mind. I had no reason to try to fix these things in my mind.
>
> Q. Under what circumstances was the form of decision you refer to submitted to you? A. Well, you pressed your argument that a decision could be written in favor of the employer—in favor of the Commission. I said to you 'Well, if you think a decision can be written in favor of the Commission you submit one and I will look it over'. And you did" (S. C. pp. 113, 114).

This "decision", written and submitted by counsel for the Commission, was put into evidence as Exhibit P-6 by counsel for the company (S. C. pp. 119, 120).

21. In this manner the months went by from January until June. Counsel for the company, ignorant of these conferences, was at a loss to understand the delay and went so far as to complain to a member of the Commission that he was "being pushed around a little bit" (S. C. bottom p. 194), and that he "was a little unhappy about it" (S. C. top p. 195).

In the hallways and offices of the Commission in Trenton the *Horsman Dolls* case was being discussed as *The* case

before the Commission (S. C. pp. 91, 154). It was considered a matter of great importance to the Commission (S. C. pp. 108, 121); it was common knowledge that hundreds of other cases depended on it (S. C. pp. 108, 121, 154, 155); it involved millions of dollars and might result in an investigation of the agency (S. C. pp. 108, 109, 121, 122).

The Referee in the meantime could not bring himself conscientiously to decide against the company. He had already written a rough draft of his decision in favor of the company (S. C. p. 69). This was received in evidence as Exhibit P-1 for the Prosecutor (S. C. p. 81) and appears at S. C. page 253. Finally in May or June (S. C. pp. 132, 133) the Referee put his decision into final form on decision-forms furnished to him by the Commission (S. C. p. 81). This decision in final form was received in evidence as Exhibit P-2 for the Prosecutor (S. C. p. 82) and appears at S. C. page 254.

22. Then in June things began to happen again. The Referee (fully corroborated by Mr. Judge) tells it this way:

> "Well, on June 22nd—I remember the date because it is my birthday—I met him (Mr. Judge) on the train and I told him that I was going to send out the Horsman Dolls decision. I told him it had been drawn finally, it had been signed, I was going to send it out; and I told him I had come to the conclusion that the Horsman Dolls employer was correct, and that was my decision.
>
> Q. What did he do? A. He asked me to hold it up.
>
> Q. Did he ask you on the train? A. He asked me on the train, and he also sent me a memorandum to that effect.
>
> Q. What? A. He also sent me a memorandum to that effect.
>
> Q. Have you that memorandum? A. I have" (S. C. p. 80, cf. Testimony of Mr. Judge, S. C. pp. 158, 159).

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This memorandum was received in evidence as Exhibit P-3 for the Prosecutor (S. C. pp. 82, 83), appears at S. C. pages 13, 265, and reads as follows:

> "Confirming our conversation on the train this morning, don't release any decision on the Horsman Dolls case until you hear further from me" (Cf. Testimony of Mr. Judge, S. C. pp. 158, 159).

23. As may be seen from this memorandum and from his own testimony, Mr. Judge was greatly disturbed by the news he received on the train on June 22 (S. C. pp. 160, 161). He had told the Referee in January to decide the case "in accordance with his own conscience and not stultify himself" (S. C. p. 158). Nevertheless, in June he ordered the Referee not to release that decision "until you hear further from me" (S. C. p. 159). He was obviously greatly disappointed that the Referee refused to decide the case in favor of the Commission. In barring the release of the decision, which he had no right to do, Mr. Judge was no longer interested in the Referee's "conscience" or "stultification".

In his own words, Mr. Judge felt in June that he "had a bounden duty to forestall any such attack" on the Unemployment Compensation fund (S. C. p. 161), and that his failure to do so would have been a dereliction of duty (S. C. pp. 160, 161). Accordingly, as soon as he reached his office on the morning of June 22, Mr. Judge called up Mr. Ernest Eger, the Chairman of the Commission, in Atlantic City (S. C. pp. 163, 203).

Mr. Judge testified that he told Mr. Eger that the Referee was about to decide the *Horsman Dolls* case against the Commission; that the memorandum to the Referee to hold up the decision (Exhibit P-3) was sent with Mr. Eger's approval (S. C. p. 163). Mr. Eger, however, says that in this conversation he was merely asked to come to Trenton

about an important matter, the *Horsman Dolls* case, and he could not recall any other discussion (S. C. pp. 203, 204). In any event, the memorandum was sent to the Referee and the decision was held up.

24. On June 27, Mr. Eger arrived in Trenton and conferred with Mr. Judge and the Chief Counsel for the Commission (S. C. pp. 163, 204). Mr. Eger was told at this conference that the Referee had been indecisive about the *Horsman Dolls* case and unable to make up his mind; that the matter was of great importance; that conferences had been held with the Referee; that the Referee had finally concluded in favor of the company (S. C. pp. 204, 205).

Mr. Eger was not told, however, that in November, 1943, and in January, 1944, the Referee had been ready to decide in favor of the company, and had been prevented from doing so. (S. C. pp. 205, 206). Thus:

> "Q. Did they tell you that the Referee came to the conference and said, 'I am inclined to find in favor of the employer'? A. No; that information I did not have" (S. C. p. 206).

This is a vital omission. It formed the basis for Mr. Eger's future action:

> "Q. Why didn't you let the Referee file his decision? A. Well, I think I have stated it before, it was because of his apparent indecision" (S. C. p. 206).

25. After some discussion at this conference of June 27, it was suggested that the Referee should be requested to write a letter asking to be relieved of the case (S. C. pp. 163, 205). All agreed to this plan and on June 30 it was presented to the Referee at a meeting in Mr. Judge's office. Present were Mr. Judge, the Referee, the Chief Counsel and his assistant (S. C. p. 83). Neither counsel for the company nor anyone else on its behalf was present (S. C. p. 83).

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At first, the issues and merits of the case were again thoroughly discussed with legal arguments made by the Chief Counsel and his assistant (S. C. pp. 83, 84). The Referee, however, reiterated his stand that the position taken by Horsman Dolls was correct (S. C. p. 84).

Then Mr. Judge told the Referee that Chairman Eger had directed "That the Referee request the Commission in writing to be relieved of the Case" (S. C. pp. 115, 116). As the Referee testified,

> "This I refused to do on the ground that it would be tantamount or would be an admission on my part that I was either incompetent or unable to decide the issues. I told him so" (S. C. p. 116).

The conference ended on this refusal and Mr. Judge promptly informed Chairman Eger of the Referee's refusal (S. C. p. 208). On the same day, June 30, Mr. Judge ordered the Referee not to release his decision until the meeting of the Commission on July 14, 1944. This order was again in the form of a letter, Exhibit P-4, and appears at S. C., pages 13, 14. It was issued pursuant to the direction of Chairman Eger (S. C. p. 208), who testified that in no other case had a similar order ever been directed to the Referee (S. C. p. 208). The Chairman of the Commission directed this order to the Referee, although he testified that

> "I don't know anything about the case at all." (S. C. p. 209).

26. Thereafter, and on July 7 (S. C. p. 210), the Referee went to Atlantic City and conferred with Chairman Eger about the *Horsman Dolls* case (S. C. pp. 86, 87). The purpose of this meeting was to explain to Chairman Eger why the Referee refused to be relieved of the case (S. C. pp. 115, 116, 210).

Finally we come to the meeting of the Commission held on July 14, 1944 (See Excerpt from official minutes of the

meeting in Return of Writ of Certiorari, S. C. pp. 15, 19). Mr. Judge brought up the *Horsman Dolls* matter (S. C. pp. 15, 183). He told the Commissioners that the Referee had already decided the case in favor of the company (S. C. pp. 17, 165, 183, 197); that the Referee would not write a letter asking to be relieved of the case (S. C. pp. 17, 184, but cf. Testimony of Mr. Homan *contra* (S. C. pp. 196, 197), and that the case was of great importance and involved thirty or forty million dollars of the Compensation fund (S. C. pp. 285, 196). Mr. Murphy then moved that the matter of *Horsman Dolls, Inc.*, be removed from the Referee to the Commission (S. C. pp. 19, 186). The motion was carried unanimously (S. C. pp. 19, 200).

Mayor Murphy testified that he knew "nothing at all about the issues" in the *Horsman Dolls* case (S. C. p. 187); that he voted for removal of the case because of his interest as a member of the Commission in trying to protect the funds of the Unemployment Compensation Commission (S. C. pp. 186, 187, 188, 189) and because he didn't want an adverse decision in the first instance (S. C. p. 189).

Mr. Homan voted for removal because of Mr. Judge's report and the Referee's "having been worried about it. I wanted him to get some sleep" (S. C. p. 200).

Mr. Eger voted for removal because the case never should have gone to the Referee in the first place (S. C. p. 212).

27. It is this order of removal made by the Commission on July 14, 1944, which was set aside by the New Jersey Supreme Court. The order was a gross abuse of the administrative process; an autocratic, unconstitutional act.

During the cross-examination of the Referee it was disclosed that the Commission made a similar order only once prior to the *Horsman Dolls* case. It was done in a matter involving the Passaic National Bank (S. C. pp. 131,

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138). In that case also, the Chief Counsel for the Commission differed from the Referee's contemplated decision and the Commission ordered a removal (S. C. pp. 130, 139). In that case also, the Chief Counsel for the Commission assumed the dual role of "behind the scenes" judge. The *Passaic National Bank* case was removed from the Referee on July 2, 1942, and no decision had been rendered by the Commission in that case up to the time of the depositions in August, 1944 (S. C. p. 141).

28. The statements by Mr. Judge to the Commission that the *Horsman Dolls* case involves thirty to forty million dollars were entirely erroneous. The precise figures were given by William F. Dittig, who is in charge of the employers' accounts for the Commission and is Chief of the Contributors' Service (S. C. p. 216). He testified that if all employers who had filed similar petitions, including the Prosecutor and 352 others (all other having been barred by the Statute of Limitations) were to succeed in full on every issue, the maximum refund involved might approximate three million ($3,000,000) Dollars (S. C. p. 217) out of a fund of upwards of three hundred seventy million ($370,000,000) Dollars (S. C. p. 181). The total amount of refund involved in the *Horsman Dolls* case itself is about $10,000.00 for 1942 and $10,000.00 for 1943, these being maximum figures (S. C. p. 221).

29. The subject matter of this appeal is the invalid order of the Commission of July 14, 1944, removing the matter of *Horsman Dolls, Inc.*, from the Referee to itself for further hearing and determination. (See Return to the Writ, S. C. pp. 19 and 14.) The Commission proposed by this order to substitute itself for the Referee as the tribunal in that cause.

The Commission, however, was also the only respondent in the cause. It had established a tax rate or contribution rate for the company. The company protested and filed its

petition for a hearing. At the hearing, the Commission appeared, responded and defended the rate which it had established. In all respects it submitted to the jurisdiction of the Referee on the merits and contested the position taken by the Company. A decision on the merits in favor of Horsman Dolls, Inc., means that the Commission must refund the illegal exactions. A simple statement of these facts should be enough to justify an affirmance of the judgment by the Supreme Court below setting aside the order of removal.

30. One of the basic tenets of our common law system, safeguarded also by the Constitution, is that a party in a cause, or one with an interest therein, may not sit in judgment in that cause.

The Commission itself had established the rate. It then sought to be the arbiter as to the validity and propriety of that rate, when challenged by the company. This attempt did not even feign legality. It was a mockery of our Constitutional safeguards and was in utter violation of the Due Process requirements of our Federal and State Constitutions. As pointed out by Mr. Justice Brandeis, concurring in *St. Joseph Stockyards* v. *United States,* 298 U. S. 38, 73 (1936):

> "The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to value or income are correct, but that the trier of facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial, and that it shall be conducted in such a way that there will be an opportunity for a court to determine whether the applicable rules of law and procedure were observed" (at p. 73).

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This "inexorable safeguard" of due process has been demanded even in the freest and most liberal decisions of our highest court dealing with administrative tribunals. *Morgan* v. *U. S.*, 304 U. S. 1 (1938); *Morgan* v. *U. S.*, 298 U. S. 468 (1936); *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940); *Shields* v. *Utah, Idaho Central R. R. Co.*, 305 U. S. 177, 182 (1938).

31. The Horsman Dolls Company in the instant case did not ask for any special kind of hearing. It was satisfied from the outset with any fair and impartial hearing which the Commission could provide. In fact, the very Petition for Hearing filed by the Company was on forms supplied by the Commission (S. C., pp. 29, 38, 39); the cause was referred to the Referee by the Commission itself in accordance with its own established procedures (S. C., pp. 100, 102, 223, 224); the Referee was an employee of the Commission appointed by the Executive Director pursuant to the statute, R. S. 37: 21-10 (b).

With all of these things the appellant herein had no quarrel. But it did insist upon a fair and impartial hearing at some point. The Company could not receive that fair and impartial hearing and determination from the said Commission which had established the rate.

In the words of Mr. Justice Douglas,

> "The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding, so long as the requisite hearing is held before the final order becomes effective." *Opp Cotton Mills Inc.* v. *Administrator*, 312 U. S. 126 at page 153 (1941).

The order of removal made by the Commission on July 14, 1944, sought to deny the company any hearing at any

stage before an impartial tribunal, and was, therefore, null and void.

32. In addition to having fixed the rate itself, the Commission and its members have an interest in the Unemployment Compensation Fund. As members of the Commission they are interested in protecting, maintaining and safeguarding the fund. While they have no personal pecuniary interest in the fund, their interest in a representative and official capacity disqualified them from being the tribunal in the *Horsman Dolls* case—a matter in which the Company is seeking refunds from the Commission.

As a matter of fact, this was frankly admitted by one of the Commission members during the depositions. Mayor Murphy testified as follows:

> "Q. Now, what were your reasons for making the motion and voting in favor of removing the case from the Referee? A. My reason is from the explanation given; and when I heard what was involved in this fund, I personally have a great interest in trying to protect the funds of the Unemployment Compensation Commission set up in this state, and I feel as though I am charged with that responsibility as a member of the Commission, having worked for the passage of the law, having been on the Commission since its first inception, whether it is this case or any other case that is brought to my attention of this kind I would vote just the same to have it brought right directly into the Commission, as I feel they are the responsible head.
>
> Q. And you yourself did not read the record that had been taken before the Referee at the time you made your motion? A. I haven't seen the record to date, even up to now.
>
> Q. Did you know what the issues were in the case? A. I know nothing at all about the issues" (S. C., pp. 186, 187; see also similar statements at pp. 188, 189).

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In the celebrated case of *Tumey* v. *Ohio*, 273 U. S. 510 (1927), the United States Supreme Court disqualified a tribunal for similar cause. In that case, the Mayor of a town was sitting as a tribunal in ordinance violations. Aside from receiving small costs for every conviction, the fines he imposed went into the town treasury and enhanced its funds. This was held a violation of due process because the Mayor, in his representative and official capacity, had an interest in the protection and enhancement of the town funds. It was pointed out by Mr. Chief Justice Taft at pages 533-534:

> "With his interest as mayor in the financial condition of the village and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and heavy fine? The old English cases cited above of the days of Coke and Holt and Mansfield are not nearly so strong. A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him. Boston *v.* Baldwin, 139 Mass. 315, 1 N. E. 417; State ex rel. Colcord *v.* Young, 31 Fla. 594, 19 L. R. A. 636, 34 Am. St. Rep. 41, 12 So. 673."
>
> (See also *Rugan* v. *Ohio*, 277 U. S. 61 (1928).)

33. The interest of the Commission and its members in the Compensation fund is more direct than the interest of the Mayor in the *Tumey* case. The Commission, in fact, is the real party in interest in the *Horsman Dolls* case because of its relation to the fund as well as the relation of the fund to the contribution rate. This has already been passed upon and established as to this Commission by the highest Court of New Jersey. In *Provident Mutual etc. Co.* v. *Unemployment Compensation Commission*, 126

N. J. L. 348 (1941), (opinion by Oliphant, J. aff. Ct. Err. & App.), the Court clearly held and explained this relationship as follows:

> "The Unemployment Compensation Commission and its director have been named as parties defendant since they are the administrative officials designated by the Unemployment Compensation law (at p. 349).
>
> • • • • • • •
>
> "Provision is made in our Unemployment Compensation law for the assessment, levy and collection of compulsory contributions by employers as defined in the act. The moneys collected are held in a separate state fund and are disbursed by the state treasurer on requisitions of the Unemployment Compensation Commission. The members of the Commission are appointed by the Governor. The contributions to the funds are not voluntary. They are compulsory and constitute a tax. The plaintiff seeks by this proceeding to have judicially determined whether certain of its agents are employees for the purpose of ascertaining its tax liability. The state then, through its alter ego, the Unemployment Compensation Commission is the real party in interest for the amount the state is entitled to collect from the plaintiff is directly involved and the judgment sought to be obtained here would operate to control the action of the state with respect to the collection of this tax" (at pp. 350, 351).

Thus we already have a clear-cut judicial determination that this Commission is the real party in interest in a case such as the matter of *Horsman Dolls, Inc.*—wherein the contribution rate is in issue and the compensation fund may be affected.

We submit therefore that under the cases cited and under basic principles, the Commission could not itself adjudge the cause.

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A copy of the opinion of the New Jersey Supreme Court, reported in 133 N. J. L. 11; 42 Atl. (2d) 777, is annexed hereto; a copy of the opinion of the New Jersey Court of Errors and Appeals reported in 134 N. J. L. 77; 45 Atl. (2d) 681, is annexed hereto.

For the foregoing reasons Appellant contends that this appeal presents a substantial Federal question for the determination of this Court.

It is respectfully submitted that there is basis upon which the Supreme Court of the United States has jurisdiction to review the judgment of the Court of Errors and Appeals of the State of New Jersey in this cause.

NATHAN BILDER,
Attorney for Appellant.

APPENDIX "A"

NEW JERSEY SUPREME COURT—JANUARY TERM, 1945

No. 210

Filed April 13, 1945

HORSMAN DOLLS, INC., Prosecutor,

vs.

STATE OF NEW JERSEY UNEMPLOYMENT COMPENSATION COMMISSION, et al., Defendants.

On Certiorari before Justices PARKER and COLIE

Opinion

Argued January 16, 1945: Decided April 13, 1945

"Under the 'Unemployment Compensation Law' P. L. 1936 c. 270, R.S.43:21-1 et seq. where there has been a reference to a 'salaried examiner,' sometimes called a 'referee', to determine the contribution rate, such reference is irrevocable.

For the prosecutor, Samuel Kaufman.

For the defendants, Herman D. Ringle.

The opinion of the court was delivered by

PARKER, J.:

The writ brings up for review "a certain order" rendered on July 14, 1944 by the Unemployment Compensation Commission of the State of New Jersey in relation to the matter entitled "In the Matter of Horsman Dolls, Inc., then pending before William C. Nowels, Referee of the State of New Jersey Unemployment Compensation Commission." The reasons filed are twenty-four in number but need not be reproduced at length. The history of the case shortly stated is, that the Compensation Commission, in the execution of its duties under the statute (P. L. 1936, c. 270; R. S. 43:21),

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established a contribution rate for the prosecutor corporation for 1942. Prosecutor protested the rate and applied for a hearing in the usual manner, and the commission, pursuant to its own regulations, sent the matter to a "referee". The statute does not seem to provide for a "referee" by that name, but does provide for a "salaried examiner": and the power to make such appointment is not the subject of my attack here. The question for decision seems to be whether in cases like the present one, a reference to the referee is irrevocable. We answer it in the affirmative. For the defendants, reference is made to the Commission's "Regulations and Rules relating to Referee and Commission Hearings" which contains this sentence: "The Executive Director or the Commission may remove to himself or itself for determination, any proceeding before a Referee". The question then arises, whether the statute has endowed the Commission with power to make that regulation. We answer it in the negative. If such power exists it must be derived from R. S. 43:21-6(e), a paragraph too long to be reproduced here at length, which empowers the board of review to remove itself * * * the proceedings on any claim pending before an appeal tribunal. But we think that clearly this language, and indeed the whole of paragraph 6(e) refer only to claims for benefits filed by employees and have no application to the fixation of contribution rates for employers. The order under review will therefore be set aside, but without costs, the defendant Commission being a state agency, and the individual defendants being the members of the Commission. Tenement House Board *v.* Schlechter, 83 N. J. L. 88; Rayner *v.* Benjamin, 88 Id. 83, 86; Manufacturers Land Co. *v.* Board, 98 Id. 638; Kearny *v.* State Board, 103 Id. 541.

(Opinion reported in 133 N. J. L. 11; 42 A 2 777.)

APPENDIX "B"

NEW JERSEY COURT OF ERRORS AND APPEALS—OCTOBER TERM, 1945

No. 13

HORSMAN DOLLS, INC., a corporation of New Jersey, Prosecutor-Respondent

vs.

STATE OF NEW JERSEY UNEMPLOYMENT COMPENSATION COMMISSION, Defendant-Appellant.

Argued Oct. 17, 1945: decided Jan. 31, 1946.

On appeal from New Jersey Supreme Court whose opinion is reported in 133 N. J. L. 11.

For the prosecutor-respondent, Alexander Budson; Bilder, Bilder & Kaufman. Samuel Kaufman, of Counsel. Bernard Hellring, On the Brief.

For the defendant-appellant, Charles A. Malloy, Herman D. Ringle, of Counsel.

The Opinion of the Court was delivered by

BROGAN, Chief Justice.

The question presented by this appeal is the validity of an order of the Unemployment Compensation Commission by which the Commission "removed to itself" an appeal of Horsman Dolls, Inc., then pending before Mr. Nowels, employed by the Commission as a legal assistant, to whom it had been referred by the Commission. As a matter of procedure, the reference comes from the office of the Chief of Contributor's service. Mr. Nowels had been designated to act in the capacity of "referee" by the Commission's Executive Director some years ago. The Supreme Court, certiorari having been allowed, vacated the order in question holding that the reference once made was irrevocable; and further that the commission had no power, under the statute which created it (R. S. 43:21-1, et seq.) to make the regula-

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tion in question (#10) which permitted it to "remove" to itself or its Executive Director "for determination, any proceeding (pending) before a referee". (133 N. J. L. 11). This, we think, was error.

The basic question involved in the appeal which had been referred to Mr. Nowels was whether Horsman Dolls, Inc., an employer, had been assigned a proper contribution rate or tax for the year 1942. The employer contended that the rate assigned it was too high; that the rate fixed had been "adversely affected" by "improper charges" made against its account. Its right to a refund of contributions paid under protest for 1942 was necessarily involved. The employer charges that the Commission relieved Mr. Nowels of the case because it had learned that he was about to determine the matter in favor of the employer.

Despite our conclusion (a) that a reference once made is not irrevocable and (b) that a subordinate in the Commission has no power of decision in the matter of tax rate, adjustment thereof, or refund to the employer, we are impelled to say that, assuming the power in a subordinate to decide a matter referred to him, any attempt to dictate what his judgment should be or to coerce him in the conscientious expression of his opinion cannot be defended. On the other hand, it is only fair to say that Mr. Nowels, in deposition, unequivocally stated that neither the Executive Director nor any member of the Commission ever directed him "to make a decision in favor of the Commission." It is clear, however, that Nowels was of the opinion that the rate of tax imposed on the employer was excessive and that he informed the Commission and its Executive Director of his view and that thereafter he was relieved of the matter.

Resuming our examination of the question in this case: Mr. Nowels was designated as "referee". There is no such office eo nomine, provided for ni the statute, supra. There is provision for a representative of the Commission as "Deputy" to be designated by the Executive Director, to examine *claims;* and he has power to decide the issue; or he may refer it to an appeal tribunal or a board

of review, etc. (Section 6-b). There is provision for a "salaried examiner" (Section 6-d) who serves in the appeal tribunal; for a board of review (Section 6-e) which, among other things, is empowered to affirm, modify or set aside the decision of the appeal tribunal and this board may remove to itself or transfer to another appeal tribunal the proceedings on any *claim* pending before an appeal tribunal, etc., but in all cases under this chapter of the statute the subject matter is that of *claims for benefits* and nothing else. This class of claim has to do only with the rights of employees, under the statute, and does not extend beyond such subject matter. In its opinion, supra, the Supreme Court recognized that the statute made no provision for a "referee by that name" and seemed to consider that "referee" and "salaried examiner" were more or less identical. We find no support for that view in the statute. The salaried examiner functions only in the matter of claims for benefits—not in the matter of contribution rate or refund. On the precise issue between the respondent and the Commission, our view is that the statute (Section 14-G) entrusts the matter of determining whether the contributions by the employer were erroneously collected and whether there should be an "adjustment" or refund exclusively to the Commission or its Executive Director. Such determination is reviewable by certiorari (Section 14-3).

The statute, supra (11th section), under the heading "Administration", contained a particularized grant of power to the Commission for the accomplishment of the aims and objects of the statute. The Commission has the duty to determine matters of policy, has rule making powers, may require reports, make investigations, etc. It may appoint such officers, accountants, attorneys, experts, etc. as may be necessary to effectuate the purposes of the statute (Section 14-d). There is provision for hearing, the swearing of witnesses, depositions, and power of subpoena, etc. (Sections 11-h and i).

It is contended by the Commission that by virtue of this grant of power under this section of the statute, the Commission has power to refer such matter to a referee

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or, as the brief describes such role, "a hearing officer" or "examiner" or "moderator"—without power of determination—as a mere compiler of a record—for the purposes of the agency, upon which it is not binding. We concur in this view, pointing out that there is no such office as "referee" mentioned; nomenclature, however, is not important. But conceding the power to appoint a "hearer" to "compile a record", there is not a vestige of authority conferred on the Commission by the statute to invest such appointee with power of decision as plainly was intended by the Commission when this matter was referred to Mr. Nowels. The Commission may make and promulgate rules within the power granted it in the statute, supra. Any power of decision invested in or exercised by such hearer, examiner or "referee" is ultra vires. With regard to a reference of a matter of this kind to a subordinate by the Commission or its Executive Director, we think the Commission or its Executive Director may have the aid of assistants in the department. In the case of Morgan *v.* U. S. 298 U. S. 468, the court (p. 481, et seq.), passing on the administrative procedure, set out in the Packers & Stockyards Act of 1921, (U. S. C. A. Title 7, Sec. 181-229), where the Secretary of Agriculture is required to make the rate order, held that the official whose duty it is to make the rate must have heard or considered the evidence and the argument of the parties; that it is a duty akin to that of a judge; "that the one who decides must hear." The opinion then says:

> "This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in substantial sense. And to give the substance of a hearing which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly

> may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred. * * *."

If the Unemployment Compensation Commission requires the aid of its subordinate in hearing or compiling a record in a matter of the kind under consideration, there is no reason why it should not have such assistance, providing procedure such as is outlined above be followed and the evidence considered and argument heard by the agency which has power of decision—in this instance the Commission or its Executive Director. A fair and open hearing required by our law will countenance nothing less.

The respondent argues that the Commission may not sit in judgment in its own cause. The reasoning proceeds that the Commission originally fixed the rate; that on the employer's appeal the Commission "appeared, responded and defended the rate"; that it "submitted to the jurisdiction of the referee on the merits." First, the referee was without power to decide and his judgment, if made would be a nullity. The exercise of such power by him collides with the statutory provision (14-f) which places the power of adjustment and refund in the Commission or the Executive Director. But conceding that the Commission made the rate and defended it before Mr. Nowels, yet this does not disqualify the Commission or its Executive Director. To be sure, counsel for the Commission wished the case decided his way. But there is no evidence that the Commission prejudged this case on grounds that were rooted in bias or discrimination. We must assume that the judgment, when made, will represent the conscientious views of the Commission or its Executive Director on the matters in controversy. Compare U. S. *v.* Morgan, 313 U. S. 409. And if the employer, after decision, is aggrieved the matter is open to judicial review. The statute so provides.

It is further argued that the Commission has an interest in the fund. It has no pecuniary personal interest. We assume that the Commissioners have the interest which as members of the Commission they are expected to have. If they are zealous in that interest, it is no disqualification. The cases cited by the respondent are not to the contrary.

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It is next argued that the Commission obstructed the decision of the referee. The answer to this is that he had no power to decide. The respondent makes other points which have been considered but found wanting in substance.

Irrevocability of reference; Nowhere in the respondent's brief do we find any argument to support the proposition that a reference of a matter to a subordinate is irrevocable. In the very nature of things under administrative procedure, the Commission is necessarily competent to withdraw a reference from a subordinate. So many reasons can arise for the exercise of such discretion that it is not necessary to do more than refer to some of them in passing. The subordinate might become ill; circumstances might disqualify him; he might not be competent in a matter, technical in character; time might become of the essence; the matter could assume an importance that would prompt the Commission, in the public interest, to hear it in all its detail; and the like.

In conclusion, we think that that part of the rule (#10) which purports to invest a hearing officer, examiner or referee with power of "determination and decision" is void. That power is non-delegable. The statute, as stated, supra, places it in the Commission as such or in its Executive Director.

The judgment of the Supreme Court is reversed.

(Opinion reported in 134 N. J. L. 77; 45 A 2 681.)



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FILED
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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 839

HORSMAN DOLLS, INC.,

Appellant,

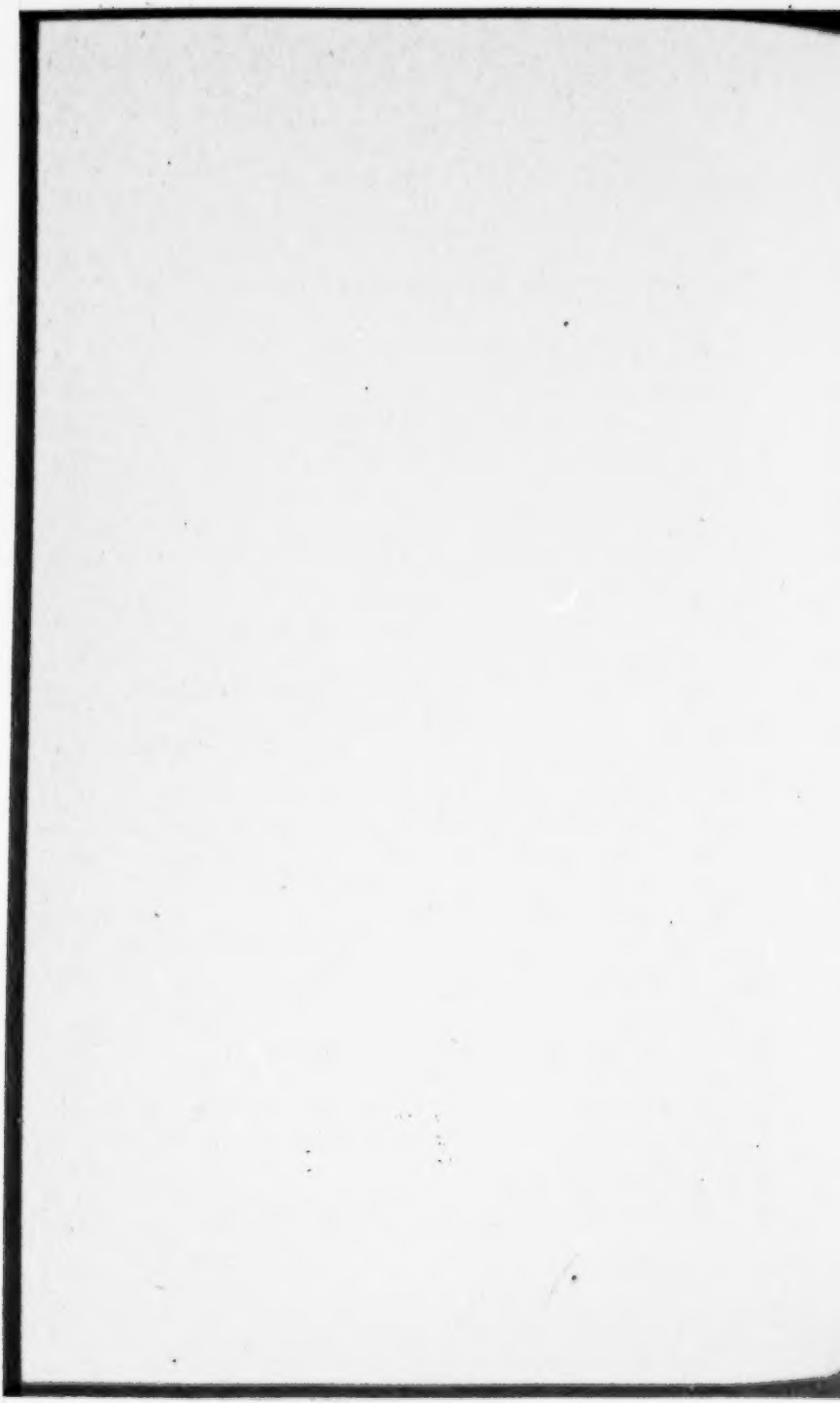
vs.

STATE OF NEW JERSEY UNEMPLOYMENT COMPENSATION COMMISSION

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

HERMAN D. RINGLE,
CHARLES A. MALLOY,
Counsel for Appellee.



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INDEX

Subject Index

	Page
Statement opposing jurisdiction and motion to dismiss or affirm	1
Nature of case	1
Statement of facts	3
Argument	8
Reasons in support of motion to affirm	8
Reasons in support of motion to dismiss	11
Motion to affirm	12
Motion to dismiss	13
Appendix—Applicable statutes	14

Table of Cases Cited

Alton R. Co. v. *Illinois Commerce Commission*, 305 U. S. 548	9
American Grocery Co. v. *A. & W. Wine and Liquor Corp.*, 131 N. J. L. 383, 36 Atl. (2d) 757	8
California Lumbermen's Council v. *Federal Trade Commission*, 312 U. S. 709	10
Endicott Johnson Corp. v. *Perkins*, 317 U. S. 501	10
Fuller Brush Co. v. *Unemployment Compensation Commission*, 124 N. J. L. 487, 126 N. J. L. 368	10
Horsman Dolls, Inc., v. *Unemployment Comp. Comm.*, 134 N. J. L. 77, 45 Atl. (2d) 681	2, 8
Levering & Garrigues Co. v. *Morrin*, 289 U. S. 103	11, 12
McArthur v. *U. S.*, 315 U. S. 787	12
Milrose Co., Inc., v. *Unemployment Compensation Commission*, 126 N. J. L. 441	11
Missouri ex rel. Hurwitz v. *North*, 271 U. S. 40	9
Morgan v. *U. S.*, 298 U. S. 468, 304 U. S. 1	9
Morgan Stanley & Co. v. *S. E. C.*, 126 F. (2d) 325	9
N. L. R. B. v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1	10
N. L. R. B. v. *J. S. Popper, Inc.*, 113 F. (2d) 602	9
N. L. R. B. v. *Weirton Steel Co.*, 135 F. (2d) 494	10

Opp Cotton Mills, Inc., v. *Administrator, etc.*, 312 U. S. 126 10
Osborne v. *Florida*, 164 U. S. 650 9
Plapao Laboratories, Inc. v. *Farley*, 302 U. S. 732 10
Poresky, Ex parte, 290 U. S. 30 12
Provident Mutual, etc., Co. v. *Unemployment Compensation Commission*, 126 N. J. L. 348 11
Raines v. *Unemployment Compensation Commission*, 319 U. S. 757 11
S. E. C. v. *Jones*, 298 U. S. 1 10
U. S. v. *Morgan*, 307 U. S. 183, 313 U. S. 409 9
Williams v. *Kaiser*, 323 U. S. 471 9
Zucht v. *King*, 260 U. S. 174 12

STATUTES CITED

New Jersey Revised Statutes:
43:21-1, et seq. 2
43:21-10 14
43:21-11 15
43:21-14 19
43:21-19 19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 839

HORSMAN DOLLS, INC., A CORPORATION OF NEW JERSEY,
Appellant,

vs.

STATE OF NEW JERSEY UNEMPLOYMENT COMPENSATION COMMISSION,
Appellee

ON APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTIONS TO AFFIRM OR DISMISS

Nature of Case

(The appellee will be referred to as the Commission.)

The question presented by this appeal is the validity of an order of the Commission by which the Commission ordered a removal to itself of certain proceedings pending before one of its legal assistants, designated under the Commission's Regulation 10 (Appendix) to sit as a "ref-

eree." In the proceedings the appellant contended that it had been assigned an improper contribution (tax) rate for the year 1942 and requested a redetermination thereof, which necessarily involved its right to a refund of contributions (taxes) paid under protest. The validity of this order was challenged by the appellant and tested in the appellate proceedings before the New Jersey Court of Errors and Appeals. *Horsman Dolls, Inc.* v. *Unemployment &c., Com.*, 134 N. J. L. 77, 45 Atl. (2d) 681.

The appellant's contentions, briefly stated, were: (1) The referee, alone, had the power to conduct the proceedings and make a decision therein; (2) The Commission, itself, was a biased and prejudiced party to the proceedings and could not impartially conduct a hearing and determine the appellant's proper contribution rate or its right to a refund of contributions, and that it could not act in the multiple role of prosecutor, litigant and judge; and (3) The Commission's action violated the appellant's constitutional rights under the "due process" clause of the United States Constitution.

The New Jersey Court of Errors and Appeals held that the New Jersey Revised Statutes 43:21-11 (Appendix) contains a particularized grant of power to the Commission for the accomplishment of the objects of the statute; that the section provides, among other things, for investigations, hearing, swearing of witnesses, depositions, power of subpoena, and appointment of subordinates; that there is no such office as "referee," *eo nomine,* provided for by the statute N. J. R. S. 43:21-1 *et seq.*; that the Commission could appoint a referee to act as a "hearing officer," without power of determination, to compile a record for its consideration, with opportunity for further argument before it; that any power of decision invested in the referee was *ultra vires;* that under N. J. R. S. 43:21-14 (f) (Ap-

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pendix) the power of refund is placed solely in the Commission or Executive Director; that there was no evidence of bias or prejudice on the part of the Commission or any member thereof or that the case had been prejudged; that the Commission or any member thereof did not have a "personal pecuniary interest" which would warrant disqualification; that no authority is found which makes a reference to a subordinate irrevocable.

Statement of Facts

Prior to March, 1941, all hearings, except those involving disputed claims for benefits, with respect to the administration of the Unemployment Compensation Law of New Jersey (R. S. 43:21-1, *et seq.*) were conducted by the Commission and the members thereof (S. C., p. 212, ll. 30-40; p. 251, ll. 14-20). At times, preliminary hearings were conducted by section heads of the Commission with the right to a final hearing before the Commission itself. The procedure led to some confusion and criticism (S. C., p. 4, ll. 35-40; p. 246, ll. 24-41; p. 247, ll. 2-3). A consideration of the foregoing by the Commission at its meetings held on December 5, 1940, and January 10, 1941, resulted in the adoption of Regulation 10 (Appendix) which provided that hearings respecting "any question of coverage, or status, or liability for contributions, penalties and interest or the amount of an assessment, or of reporting" shall be held before a referee to be appointed by the Executive Director (S. C. pp. 4-10). Administrative convenience prompted the adoption of Regulation 10 (S. C. p. 211, ll. 7-10) under the power granted by N. J. R. S. 43:21-11 (Appendix).

A legal assistant of the Commission was appointed to act as a Referee by the Executive Director in March, 1941, under the provisions of Regulation 10, and functioned there-

under (S. C. p. 89, ll. 23-40; p. 100, ll. 3-13; p. 111, ll. 3-10). It was the intention of the Commission that an employee or employees of the agency should be designated for that purpose and that the Executive Director should make the designation as he had greater personal knowledge of the qualifications of the employees (S. C., p. 247, ll. 15-40; p. 248, ll. 3-16).

On March 9, 1943, the appellant filed a petition for hearing "in accordance with Regulation 10" (S. C., pp. 38, 39; p. 226, ll. 13-36) and a hearing was scheduled before the referee to commence on April 15, 1943 (S. C. p. 39, ll. 20-40; p. 40). The appellant contended that it had been assigned an improper contribution rate because improper benefit charges had been made to its account; the petition was also construed as an application for a refund of contributions paid under the assigned rate (N. J. R. S. 43:21-14 (f)) (Appendix).

The hearings before the referee actually commenced on May 14, 1943, and continued hearings were held on four other days, concluding on November 1, 1943. The appellant's attorney then submitted a brief to the referee but the attorneys for the Commission, in accordance with the well-settled practice (S. C., p. 233, ll. 20-31) did not submit a brief.

In January, 1944, the referee saw Mr. Frank T. Judge, Acting Executive Director of the Commission, at his office and requested a conference in the presence of Mr. Malloy and Mr. Ringle, which request was granted. (S. C., p. 149, ll. 19-32; p. 167, ll. 30-32; p. 169, ll. 3-14; p. 235, ll. 36-39). The legal phase of the issues only was discussed. (S. C., p. 77, ll. 18-24; p. 150, ll. 8-23). Discussions by the attorneys and the referee with respect to cases were common (S. C., pp. 107, 108) as the referee sat as a fact-

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finding hearer (S. C., p. 105, ll. 18-24); the views of the attorneys of the Commission were impartial and often supported the position of the employer or employing unit, all of which was testified to by the referee (S. C., pp. 107, 108, ll. 3-11).

With respect to the respondent's case the referee testified as follows:

> "Q. Well, what sort of pressure was brought to bear upon you by Mr. Judge?"
>
> "Q. (Question read by the reporter.) A. Well, I wouldn't say any pressure was brought upon me except we were having these conferences. I wouldn't say there was any pressure; I was not told to decide in favor of the Commission." (S. C., p. 88, ll. 25 and 26, ll. 38-40; p. 89, ll. 3 and 4).
>
> "Q. Mr. Nowels, were you ever directed by Mr. Judge or any other representative of the Commission to make a decision in favor of the Commission in these proceedings? A. No." (S. C., p. 94, ll. 10-14).
>
> "Q. Did any representative of the Commission or any Executive of the Commission direct you to write a decision other than on the merits? A. No." (S. C., p. 97, ll. 36-39).

On July 14, 1944, the Commission voted to remove the case to itself for the reasons stated in the record of the minutes of its meeting held on that day (R., pp. 15-19). Regulation 10 (Appendix). Six Commissioners present voted for the order. One Commissioner was absent. The reasons which prompted the order of removal, as stated therein, briefly are:

1. The importance of the case as a representative one of more than 350;
2. The amount of public funds involved;
3. The need for a speedy disposition of the case;

4. The growing publicity of the case;

5. The intimation of a widespread soliciting activity by attorneys and others.

There is no proof of any bias or prejudice on the part of the Commission or any member thereof, nor even a suggestion of bias or prejudice. With respect to the foregoing the referee testified that he had never discussed the case with any of the Commissioners except Commissioner Ernest Eger, and that the discussions with Commissioner Eger did not pertain to the merits of the case (S. C., p. 90, ll. 24-41; p. 91, ll. 3-9; p. 92, ll. 32-40; p. 93, ll. 3-50).

Commissioner Eger testified as follows:

"Q. Now, Commissioner, have you prejudged the Horsman Dolls case on the merits? A. No, sir; I don't know a thing about it.

"Q. And is there any reason why you will not decide the case impartially after you have read the record and consider it on the merits? A. None whatever.

"Q. And if on the facts and on the merits of the case a determination should be made in favor of the position taken by Horsman Dolls, Inc., wouldn't you vote in favor of such a determination? A. Yes, indeed.

"Q. So that at this moment there is no reason to believe, is there, Commissioner, that the Commission as a body may not, after considering this case on the merits, render a decision favorable to the position of Horsman Dolls, Inc.? A. I think every Commissioner is impartial on the matter and that he will decide and vote for a decision in line with his own judgment of the case after hearing all of the facts developed.

"Q. So that a decision in all probability at this moment, as far as we can look ahead, could be made either for or against the position taken by Horsman Dolls? A. I think so." (S. C., p. 213, ll. 11-35.)

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And Commissioner Eger had previously testified as follows:

> "Q. Well, what was the importance of this case, therefore, that summoned you up from Atlantic City, with the referee writing a decision in favor of an employer? A. Well, frankly—possibly this is not admissible, but had I been chairman at the inception of this case and had I known of the case, I could have formed my own conclusions as to its importance; and frankly, I don't think it would have ever gone to Nowels as a hearer.
>
> "Q. That is what you might have done had you known when the case first started? A. I am certain I would have done that.
>
> "Q. Would it have gone to anyone else to hear it? A. No; it would have gone to the Commission" (S. C., p. 206, ll. 24-38).

Commissioner Murphy gave similar testimony to similar or identical questions (S. C., p. 189, ll. 30-40; p. 190, ll. 3-40; p. 191, ll. 3-8); and Commissioner Homan gave similar testimony to similar or identical questions (S. C., p. 201, ll. 20-41; p. 202, ll. 3-8).

The only attorney who had discussed the case with any Commissioner for the purpose of inducing or suggesting a result such as a settlement was the appellant's counsel who on several occasions had talked to Commissioner J. Albert Homan (S. C., p. 192, ll. 24-31).

The referee had performed his duties only under the provisions of Regulation 10 and had never heard any cases involving disputed "claims for benefits" but had heard only those involving issues presented by employers or employing units with respect to their status, liability, etc. (S. C., p. 234, ll. 10-14).

ARGUMENT

Point I

Reasons in Support of Motion to Affirm Judgment of the Court of Errors and Appeals

1. The appellant's appeal to this honorable court is based upon its interpretation of N. J. R. S. sections 43:21-10 (b) and 11 (Appendix). It contends that the Commission, under the aforementioned sections, must appoint an independent judicial tribunal to hear all cases affecting status, liability, refunds, etc.; that this was done by the appointment, under Regulation 10 of the Commission, of the referee; and that the right to remove cases as provided for in the Regulation was without statutory authority. This interpretation of the statute was repudiated by the New Jersey Court of Errors and Appeals.

Horsman Dolls, Inc. v. *Unemployment &c. Comm.*, 134 N. J. L. 77, 45 Atl. (2d) 681.

With status and liability as a predicate the agency is authorized, under the tests and definitions prescribed in the statute, to determine its own organization and methods of procedure, make investigations, subpoena witnesses and records, administer oaths, promulgate rules and regulations appropriate to the matters covered by the statute in order to administer the law and carry its object into effect, and to exercise a sound discretion in making determinations (N. J. R. S. 43:21-11, 14 and 19(i)(6)) (Appendix). *Horsman Dolls, Inc.* v. *Unemployment &c. Comm., supra.*

In *American Grocery Co.* v. *A. & W. Wine and Liquor Corp.*, 131 N. J. L. 383, 36 Atl. (2d) 757, the Court held that the Unemployment Compensation Commission of New Jersey is by statute constituted the agency of the State for

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determining the liability to pay and the amount of contributions.

As pointed out by the New Jersey Court of Errors and Appeals, under subsection N. J. R. S. 43:21-14(f) (Appendix), the Commission or Executive Director is solely and exclusively vested with the power to determine the appellant's right to a refund. This is a power that cannot be delegated and was not delegated by Regulation 10.

Without specific statutory authority, as pointed out by the New Jersey Court, the adjudicating function in any instance cannot be delegated by the Commission.

Morgan v. *U. S.* (1935), 298 U. S. 468;
Morgan v. *U. S.* (1937), 304 U. S. 1;
U. S. v. *Morgan* (1938), 307 U. S. 183;
U. S. v. *Morgan* (1940), 313 U. S. 409.

The construction of the statute adopted by the highest appellate court of the State of New Jersey and its interpretation of the scope of the law must be accepted as conclusive.

Osborne v. *Florida*, 164 U. S. 650, 654;
Missouri ex rel. Hurwitz v. *North*, 271 U. S. 40;
Neblett v. *Carpenter*, 305 U. S. 297;
Alton R. Co. v. *Illinois Commerce Commission*, 305 U. S. 548;
Williams v. *Kaiser*, 323 U. S. 471, 473.

The construction given by courts and administrative bodies to the rules and regulations promulgated by them is controlling, and particularly when their interpretation is a matter in issue in another court.

N. L. R. B. v. *J. S. Popper, Inc.* (C. C. A. 3d), 113 F. (2d) 602;
Morgan Stanley & Co. v. *Securities & Exchange Commission* (C. C. A. 2d., 1942), 126 F. (2d) 325.

2. The fact that an administrative body appears to act in the multiple role of prosecutor, litigant and judge does not violate Constitutional requirements but conforms to accepted judicial standards. It has never, heretofore, been held, in the absence of a specific statutory requirement to that effect, that an administrative body must segregate its quasi-judicial functions from its executive functions and vest the former in an independent tribunal. It may properly delegate the hearing of cases to a "hearing officer" for the purpose of compiling a record, provided that the adjudicating function is not delegated.

Morgan v. *U. S.* (four cases), *supra;*

Securities & Exchange Commission v. *Jones,* 298 U. S. 1;

N. L. R. B. v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 25, 49;

Plapao Laboratories, Inc. v. *Farley,* 302 U. S. 732;

Opp Cotton Mills, Inc. v. *Administrator, Etc.,* 312 U. S. 126;

Endicott Johnson Corp. v. *Perkins,* 317 U. S. 501;

California Lumbermen's Council v. *Federal Trade Commission,* 312 U. S. 709;

N. L. R. B. v. *Weirton Steel Co.* (C. C. A. 3d), 135 F. (2d) 494, 496.

All decisions of the Commission may be reviewed in certiorari proceedings before the Supreme Court. This is not only provided for in section 14 of the statute but has been settled by judicial pronouncements. A few of the many decisions which have affirmed or reversed the Commission's decisions may be named:

Fuller Brush Co. v. *Unemployment Compensation Commission,* 124 N. J. L. 487, aff'd 126 N. J. L. 368;

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Provident Mutual Etc. Co. v. *Unemployment Compensation Commission* (Errors and Appeals), 126 N. J. L. 348;

Milrose Co., Inc. v. *Unemployment Compensation Commission*, 126 N. J. L. 441;

Raines v. *Unemployment Compensation Commission*, 319 U. S. 757.

3. The Commission or any member thereof is not biased or prejudiced. This is so obvious from the record as disclosed in the statement of facts herein that no further comment is necessary. We do, however, direct attention to the impropriety of the examination conducted by the appellant in the court below when it subpoenaed the members of the Commission and subjected them to examination for the purpose of probing their mental processes. Such a practice was denounced in an analogous situation by this Honorable Court in the case of *U. S.* v. *Morgan*, 313 U. S. 409.

Point II

Reasons in Support of Motion to Dismiss the Appeal

1. The presence of a substantial Federal question is essential to sustain jurisdiction in this Honorable Court. If the questions presented are plainly unsubstantial, jurisdiction is wanting.

Levering & Garrigues Co. v. *Morrin*, 289 U. S. 103, 105.

A claim of unconstitutionality is unsubstantial where (a) it is "obviously without merit," or (b) "its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy."

Ex Parte Poresky, 290 U. S. 30, 32;
Levering & Garrigues Co. v. *Morrin, supra.*

There is no section of the Unemployment Compensation Law of New Jersey which is challenged as being unconstitutional, nor was such a challenge made in the courts below. The challenge of the appellant that the Commission's action contravened the "due process" clause was based solely upon the appellant's erroneous interpretation of the statute.

2. The appellant has no constitutional right to a particular form of remedy.

Neblett v. *Carpenter, supra.*

3. Every Constitutional issue attempted to be raised by the appellant has been explicitly foreclosed by the decision of the New Jersey Court of Errors and Appeals and the previous decisions of this Court, as set forth in Point I herein. For the sake of expediency the citations set out therein will not be repeated.

4. It is respectfully submitted, therefore, that the Constitutional questions urged by the appellant have been so plainly foreclosed by the decisions referred to, hereinbefore, as to leave no room for real controversy, and the appeal, if the judgment of the court below is not affirmed, should be dismissed for want of a substantial Federal question.

Zucht v. *King,* 260 U. S. 174, 176;
McArthur v. *U. S.,* 315 U. S. 787.

Motion to Affirm Judgment of the New Jersey Court of Errors and Appeals

Therefore, comes now the appellee herein, by his attorney, and moves the Court to affirm the judgment from which the appeal in the above entitled cause has been taken, on the

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ground that it is manifest that every question on which the decision of the cause depends has been so explicitly foreclosed by the previous decisions of this Court as to render further argument thereof unnecessary.

In the alternative:

Motion to Dismiss the Appeal

Therefore, comes now the appellee herein, by his attorney, and moves the Court to dismiss the appeal for want of a substantial Federal question.

HERMAN D. RINGLE,
Attorney and Counsel for Appellee;
CHARLES A. MALLOY,
Chief Counsel.

Dated: August 21, 1946.

APPENDIX

"N. J. R. S. 43:21-10. UNEMPLOYMENT COMPENSATION COMMISSION.

(b) Executive director. The commission shall appoint an executive director who shall be the chief executive and approval officer of the commission and its official agent for all purposes, and who shall hold office at its pleasure. He shall give his full time to the duties of this office, shall be paid a suitable salary to be fixed by the commission and shall have general charge and supervision of the work of all departments of the commission as well as any subdivisions thereof.

It shall be the duty of the executive director to administer this chapter with the advice of the commission; and to that end, the executive director shall have the following duties and powers:

(1) To formulate necessary rules and regulations, subject to approval by the commission.

(2) To appoint and fix the compensation of members of the staff, subject to approval by the commission and subject to the provisions of subsection (d) of section eleven of this chapter.

(3) To make such expenditures as are necessary in the discharge of his functions hereunder as provided for in the budget to be approved annually by the commission, to make requisitions for any funds provided by the Federal government for administration of this chapter, and he is hereby authorized to draw vouchers on the administration fund for the purpose of administering this chapter.

(4) To draw vouchers upon the unemployment compensation fund and the appropriate accounts therein for the payment of benefits.

(5) To delegate to other persons any of the powers conferred upon him by this chapter, so far as is reasonably necessary.

(e) Powers and duties. The commission shall have the following specific powers and duties:

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(1) To designate its chairman.

(2) To study the operation of this chapter and from time to time prepare recommendations to the Governor and Legislature with respect to any improvements which might be desirable.

(3) To make rules and regulations governing its own procedure.

(4) To advise the executive director and other members of the commission staff with particular respect to policies and procedures.

(f) Quorum. Any four commissioners shall constitute a quorum. No vacancies shall impair the right of the remaining commissioners to exercise all of the powers of the commission."

"N. J. R. S. 43:21-11. ADMINISTRATION.

(a) Duties and powers of the commission. It shall be the duty of the commission to determine all matters of policy; and it shall have power and authority to adopt, amend, or rescind such rules and regulations, require such reports, make such investigations, and take such other action as it deems necessary or suitable to that end or to administer this chapter; provided, that the commission may delegate such power and authority to the executive director subject to their ultimate supervision and control. Such rules and regulations shall be effective upon publication in the manner, not inconsistent with the provisions of this chapter, which the commission shall prescribe. The commission shall determine its own organization and methods of procedure in accordance with the provisions of this chapter, and shall have an official seal which shall be judicially noticed. Not later than the first day of February of each year, the commission shall submit to the Governor a report covering the administration and operation of this chapter during the preceding calendar year and shall make such recommendations for amendments to this chapter as the commission deems proper. Such report shall include a balance sheet of the moneys in the fund in which there

shall be provided, if possible, a reserve against the liability in future years to pay benefits in excess of the then current contributions, which reserve shall be set up by the commission in accordance with accepted actuarial principles on the basis of statistics of employment, business activity, and other relevant factors for the longest possible period. Whenever the commission believes that a change in contribution or benefit rates will become necessary to protect the solvency of the fund, it shall promptly so inform the Governor and the Legislature, and make recommendations with respect thereto. The commission shall make a study of the problem of paying partial benefits for partial unemployment.

(b) Regulations and general and special rules. General and special rules may be adopted, amended, or rescinded by the commission. General rules shall become effective ten days after filing with the Secretary of State and publication in one or more newspapers of general circulation in this State. Special rules shall become effective ten days after notification to or mailing to the last known address of the individuals or concerns affected thereby. Regulations may be adopted, amended, or rescinded by the commission and shall become effective in the manner and at the time prescribed by the commission.

(c) Publication. The commission shall cause to be printed for distribution to the public the text of this chapter, the commission's regulations and general rules, its annual reports to the Governor, and any other material the commission deems relevant and suitable and shall furnish the same to any person upon application therefor.

(d) Personnel. Subject to other provisions of this chapter, the commission is authorized to appoint (subject to the provisions of Title II, Civil Service), fix the compensation, and prescribe the duties and powers of such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of its duties. All positions shall be filled by persons selected and appointed on a nonpartisan merit basis from lists of eligible persons prepared by the Civil Service Commission, in accordance with

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the provisions of Title II, Civil Service, except that any attorney, now or hereafter in office or position of legal assistant for the commission, shall be placed in the exempt class of the civil service and thereafter shall not be subject to removal except for cause and then only in accordance with the provisions of Title II, Civil Service; provided, however, that nothing herein shall be construed to apply to any attorney designated as special counsel in accordance with the provisions of sections 43:21-6, subsection (h), and 43:21-17. The commission shall not employ or pay any person who is an officer or committee member of any political party organization. The commission may delegate to any such person so appointed such power and authority as it deems reasonable and proper for the effective administration of this chapter, and may in its discretion bond any person handling moneys or signing checks hereunder.

(e) Advisory councils * * *.

(f) Employment stabilization * * *.

(g) Records and reports * * *.

(h) Oaths and witnesses. In the discharge of the duties imposed by this chapter, the chairman of an appeal tribunal and any duly authorized representative or member of the commission, the executive director or any deputy director thereof or member of the board of review shall have power to administer oaths and affirmations, take depositions, certify to official acts, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with a disputed claim or the administration of this chapter. Witnesses subpoenaed pursuant to this section shall in the discretion of the commission be allowed fees at a rate to be fixed by it. Such fees shall be deemed a part of the expense of administering this chapter.

(i) Subpoenas. In case of contumacy by, or refusal to obey a subpoena issued to any person, any court of this State within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person

guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the commission or its duly authorized representative, or the board of review, shall have jurisdiction to issue to such person an order requiring such person to appear before the board of review or a member thereof, a commissioner, the commission, the executive director, or his duly authorized representative, there to produce evidence if so ordered or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof. Any person who shall without just cause fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if it is in his power so to do, in obedience to a subpoena of the commission or of the board of review shall be punished by a fine of not more than two hundred dollars ($200.00) or by imprisonment for not longer than sixty days, or by both such fine and imprisonment, and each day such violation continues shall be deemed to be a separate offense.

(j) Protection against self-incrimination. No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, and other records before the commission or the board of review or in obedience to the subpoena of a member of the commission or the executive director thereof, or any duly authorized representative of the commission in any cause or proceeding before the commission, the board of review or a member thereof, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

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"N. J. R. S. 43:21-14. Collection of Contributions.

(f) Refunds. If not later than one year after the date on which any contributions or interest thereon became due, an employer who has paid such contributions or interest thereon shall make application for an adjustment thereof in connection with subsequent contribution payments, or for a refund thereof because such adjustment cannot be made, and the commission or executive director shall determine that such contributions or interest or any portion thereof was erroneously collected, such employer shall be allowed to make an adjustment thereof, without interest, in connection with subsequent contribution payments by him, or if such adjustment cannot be made the said amount shall be refunded, without interest, from the fund. For like cause and within the same period, adjustment or refund may be so made on the initiative of the commission through the executive director."

"N. J. R. S. 43:21-19. Definitions.

(i)(6) Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the commission that

(A) such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and

(B) such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) such individual is customarily engaged in an independently established trade, occupation, profession or business."

"Regulation 10. Referee and Commission Hearings.

Any written notice of determination by a representative of this Commission, as to any question of coverage, or status, or liability for contributions, penalties and interest

or the amount of an assessment, or of reporting, shall be deemed final, unless any party with an interest in the matter shall make written request for a hearing within twenty days after receipt of the notification, or thereafter upon good cause shown.

Upon receipt of the request for hearing, the Director of Contributors' Service shall supply necessary forms of 'Petition for Hearing' which shall be returned to him within ten days.

All hearings shall be held before a Referee or Referees, designated by the Executive Director in accordance with provisions of Section 10(b) of the Unemployment Compensation Law.

Upon the filing of the 'Petition for Hearing,' copies shall be furnished to the Referee and the Chief Counsel.

The Referee shall acknowledge the receipt of the 'Petition for Hearing' by mailing a 'Notice of Hearing' to the parties concerned. A copy of such notice shall be furnished to the Chief Counsel. All hearings shall be promptly scheduled.

The 'Notice of Hearing' shall be sent at least ten days in advance, to the parties with an interest of record specifying the place, date, and time of hearing.

The Referee shall preside at and conduct the proceedings necessary for a determination of any and all issues. He shall have the power to issue subpoenas to compel the attendance of witnesses, production of books, records, or memoranda necessary as evidence. He shall have the power to administer oaths, take depositions, take testimony, examine and cross-examine all witnesses, and do such other acts as may be necessary for the hearing and determination of the issues referred, or involved. The Chief Counsel, his representative, or any qualified representative of the Commission shall have the right to appear at any hearing and examine and cross-examine any witnesses and evidence produced.

All hearings shall be conducted in an informal manner. A technical observance of the rules of evidence shall not be required. The testimony shall be confined to developing the facts pertinent and relevant to the issues. Stipulations

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in writing of facts agreed upon may be entered into and made a part of the record.

A complete stenographic record of the hearing shall be made and, if necessary, transcribed, and the parties furnished a copy.

At the conclusion of the hearing, or thereafter, oral argument upon both law and facts may be presented or required. The Referee may request or permit the filing of briefs or written memoranda and fix the time within which they may be submitted.

The Referee shall report his findings of facts together with his determination and decision in writing to the Executive Director not later than thirty days, except where exceptional circumstances warrant otherwise, after the conclusion of the hearing or the submission of written arguments. Copies of the finding of facts, determination and decision shall be supplied or mailed to all parties, including any Bureau or Unit of the Commission interested.

Any interested party may, within ten days after receipt or mailing of the finding of facts, determination and decision of the Referee, file a petition for review or a hearing de novo by the Commission.

The Executive Director or the Commission may, in his or its discretion and on his or its own motion, affirm, modify or set aside any findings of facts, determination and decision of a Referee, on the basis of the evidence and testimony previously submitted, or upon additional evidence or testimony.

The Commission may authorize any member or members to preside at and conduct any hearing before it by way of review or otherwise.

The Executive Director or the Commission may remove to himself or itself for determination, any proceeding before a Referee.

The Executive Director or the Commission shall be furnished with the necessary copies of the record and of the findings of facts, determination and decision of the Referee where a Petition for Review or a hearing de novo has been filed or the proceedings removed.

The Executive Director or the Commission shall give written notice of the time and place for review or hearing de novo.

The proceedings before the Executive Director or the Commission shall be conducted in the same manner and with the same procedures as before the Referee. Briefs or written memoranda may be presented or requested and submitted within a time which may be fixed by the Executive Director or the Commission.

The decision of a majority of the Commission shall control. The minority may file a dissenting opinion. Copies of all findings of fact, determinations and decisions and opinions shall be supplied or mailed to all interested parties.

The decision or determination or ruling of the Executive Director or of the Commission shall become final ten days after notification or mailing thereof; applications or requests for reconsideration or redetermination may be made within the ten-day period, or thereafter upon good cause shown. No decision, determination or ruling of the Executive Director or of the Commission shall be suspended or held in abeyance, except when an application or request for reconsideration or redetermination has been allowed or granted.

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No. 839. HORSMAN DOLLS, INC. *v.* NEW JERSEY UNEMPLOYMENT COMPENSATION COMMISSION. Appeal from the Court of Errors and Appeals of New Jersey. February 3, 1947. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Nathan Bilder* for appellant. *Herman D. Ringle* for appellee. Reported below: 134 N. J. L. 77, 45 A. 2d 681.